

# TRUST Talk

MARCH 2015 | Issue 3

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## Purchasing & Selling Property as Trustees

While trustees can specify that they are entering into the contract as trustees of a trust, it is important that the trustees are also individually identified. This is important for a number of reasons. For example in some circumstances the correct identification of trustees can determine whether or not any limitations of liability are available in standard agreements for sale and purchase.

It can also assist in ensuring all trustees are bound to the agreement. In the case of *WT Trustee Company Limited v Cato* only two of three trustees signed an agreement for sale and purchase. The third trustee who had agreed to the property being sold, but not to the particular sale in question, refused to co-sign the agreement as he was dissatisfied with the price. The disappointed "purchaser" was unable to enforce the agreement as there was not a binding agreement (the agreement not being signed by all of the trustee owners).

A similar result occurred in *Burt v Henry*, where the purchaser Mr Burt sought to enforce an agreement signed by one of two trustees. The Judge in this case noted that

"The plaintiff's case is based on the evidence of Mr Burt and, in particular, the following passage "It is about this time, the 4th of August 2006 that I was assured by Simone that the second-named defendant Clark Howard Taylor had the authority to bind both vendors and that Allan Henry's signature was only required as a formality because he was also a trustee of the trust which owned the land."



This statement raises an important aspect of trust ownership that is often misunderstood both by trustees and others. All trustees are of equal standing. There is no special capacity of "professional trustee".

Equally, when trustees are entering into an agreement, it is important that all of the trustees sign the agreement. If they do not, and a trustee subsequently refuses to do so, the signatories to the contract can be solely liable for the purchase.



# Trustee Liability

What are the risks?

Many trustees do not fully appreciate that a trust cannot exist independently of its trustees and that it is the trustees that take on the risks related to the trust assets, as well as the management of the trust and any business enterprises carried on. It is trustees that own the trust's assets not the trust.



In most circumstances, a trustee is personally liable for any losses that arise from the trusteeship. This is the case whether or not the trustee can benefit from the trust. This is because trustees act personally. As a result,

trustees can be liable to beneficiaries and to third parties. While trustees can limit their liability by agreement with third parties, if no limitation of liability is agreed then the trustees retain unlimited liability.

To avoid personal liability it is common for independent or professional trustees to limit their liability to the assets of the trust when contracting with third parties such as banks.

Liability can also be incurred in non-contractual situations (such as tax liabilities) where liability cannot be limited by agreement, whether or not a trustee can benefit from the trust.

Where a trustee incurs liability with a third party, provided the trustee has acted properly, the trustee is normally indemnified for any loss from the assets of the trust. However, where the assets are insufficient, if the trustee does not have an agreed limitation of liability (say, where liability is limited to the assets of the trust), the trustee is liable for the balance.

If a trustee has committed a breach of trust (that is failed to act in accordance with the terms of the trust), regardless of the extent of trust assets, the trustee can also be liable to beneficiaries for any loss that occurs.



Being a trustee is an increasingly risky enterprise. Any trustee who has concerns about liability should seek advice.

## When & how to involve the children

Trusts can provide excellent long-term intergenerational asset protection. However, to achieve this it is necessary to recognise that part of the management of the trust involves the education of the next generation to develop the future trustees.

Settlors may be reluctant to discuss the family trust with children, concerned that this might lead to demands on the trustees for support. However, where the next generation of potential trustees are not adequately educated in trust management they may not be well enough equipped to take up an appointment of trustee on the eventual death or incapacity of a parent. It is also important to manage the beneficiaries' demands and expectations.

This can start with simple discussions about the trust once children are adults. The next step might be to distribute trust information to children on an annual basis. This also gives the trustees the opportunity to open dialogue with beneficiaries so that the trustees can better appreciate the needs of different beneficiaries.

While the idea of talking to beneficiaries about trust assets can seem daunting, finding a balance that is right for each trust can be an important step in the long-term management of a trust.

### What are Beneficiaries entitled to ask for...

A beneficiary is generally entitled to ask a trustee for information about a trust including:

- the deed of trust and any deeds of variation (i.e. the documents that set out the terms of the trust and any subsequent changes)
- the trust's financial accounts
- full details of the trust's assets and liabilities
- contact details for the trustee and any former trustees
- any documents relating to the appointment or removal of trustees
- details of all distributions of capital and income and who the distributions were made to (e.g. payments to beneficiaries)

*\* Information taken from TrustTALK | Dec Issue 2*

## Key Contacts

### Directors

Leanne Southey  
Rebecca Sayer



### Offices

110 Dixon Street  
PO Box 125  
Masterton 5840

**Contact:** (06) 370 0811

**Email:** [ca@sosa.co.nz](mailto:ca@sosa.co.nz)

**Website:** [www.sosa.co.nz](http://www.sosa.co.nz)

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